

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matters of

All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately)

Docket No. EA-12-051  
ASLBP No. 12-918-01-EA-BD01

All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status: Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately)

Docket No. EA-12-050  
ASLBP No. 12-918-01-EA-BD01

NRC STAFF RESPONSE TO THE BOARD ORDER  
DIRECTING STAFF TO AMEND FILING ON 10 C.F.R. § 2.206

The NRC staff (“Staff”) hereby submits its response to the Board’s Order (Directing Staff to Amend Filing on 10 C.F.R. § 2.206) (“Order”).<sup>1</sup> Having reviewed the Staff’s response to its Order of May 17, 2012,<sup>2</sup> the Board found that “the Staff did not comply with the Board’s directive”<sup>3</sup> to provide the Board with a list of petitions filed pursuant to 10 C.F.R. § 2.206 for which substantive relief was granted. The Board explained that, contrary to its instruction, “the Staff elected to supply the Board with each and every petition in response to which some action

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<sup>1</sup> Board Order (June 19, 2012) (unpublished).

<sup>2</sup> Board Order (Requesting Filing on Petitions under 10 C.F.R. § 2.206) (May 17, 2012) (unpublished).

<sup>3</sup> Order at 2.

was taken by it.”<sup>4</sup> According to the Board, “the Staff chose simply to ignore the manifest distinction between substantive and procedural relief.”<sup>5</sup> Thus, the Board ordered the Staff to provide an amended response, which identifies “those of the 142 Directors’ Decisions listed in the June 15, 2012 response that, in fact, provided substantive relief to the petitioner.”<sup>6</sup>

First, the Staff takes strong exception to the Board’s conclusion that “the Staff chose simply to ignore the manifest distinction between substantive and procedural relief.”<sup>7</sup> While reasonable minds can differ on whether relief in a particular instance is substantive or procedural in nature, the Board chose not only to disagree with the Staff’s conclusions in this regard, but found that the Staff “chose simply to ignore” that distinction, in violation of the earlier Board order. Ascribing this intent to the Staff is simply baseless. For the reasons that follow, the Board’s characterization of the Staff’s intent and approach to responding to the Board’s May 17 Order is incorrect.

In support of its position, the Board cites Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-90-3, 31 NRC 595 (1990) as a case where “it is obvious the relief could not possibly be characterized as substantive in nature.”<sup>8</sup> In DD-90-3, the Director of Nuclear Reactor Regulation noted that the petitioner had requested the NRC to take enforcement action against the licensee for violating its antitrust license conditions for Diablo Canyon.<sup>9</sup> Based in part on the findings of a related case in the United States District Court for the Northern District of California, the Director ultimately took enforcement action

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2.

<sup>9</sup> Pacific Gas and Electric Company, 31 NRC at 595.

against the licensee in the form of a Notice of Violation (“NOV”).<sup>10</sup> Issuance of an NOV by the Staff was not a foregone conclusion following the Court’s findings. Yet, the Board apparently did not view the NOV, and the letter required of the licensee demonstrating compliance, as relief that is substantive in nature. The Staff does not agree.<sup>11</sup>

In complying with the Board’s earlier Order, the Staff carefully considered the Order, thoroughly performed its research, and prudently memorialized its results.<sup>12</sup> The Staff’s impetus, quite plainly, was to provide the Board with a full and complete picture of the substantive relief granted under the Section 2.206 petition process since 1975. As stated earlier, while reasonable minds can differ with respect to whether a particular matter is one of procedure or substance, the Staff maintains that its identification and characterization of 142 Directors’ Decisions as decisions that grant substantive relief is well-based and correct. Despite the Board’s rather extreme characterization of the Staff’s approach to the Board’s May 17 Order (“Staff chose simply to ignore” the requirements of the Order<sup>13</sup>), the Staff stands by its initial determination and continues to maintain that each of those instances reflects substantive relief provided to the petitioner. Respectfully, the Board’s conclusion to the contrary is simply wrong.

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<sup>10</sup> *Id.* at 603-04. The Director also issued a letter requiring the licensee to report the steps it had taken to comply with the District Court’s ruling. *Id.*

<sup>11</sup> The Staff notes that an NOV is an integral part of the NRC Enforcement Policy, which is vital to NRC oversight of licensed activities and ensures that licensees are complying with legally binding requirements. See 10 C.F.R. § 2.201; Section 2.2.3 of the NRC Enforcement Policy (ADAMS Accession Number ML12132A394) at 15.

<sup>12</sup> See NRC Staff Response to the Board Order Regarding Petitions Under 10 C.F.R. § 2.206 at Attachment (June 15, 2012).

<sup>13</sup> Order at 3.

Respectfully submitted,

/Signed (electronically) by/  
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Dated at Rockville, Maryland  
this 26th day of June, 2012

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO THE BOARD ORDER DIRECTING STAFF TO AMEND FILING ON 10 C.F.R. § 2.206" has been served in the above-captioned proceeding upon the following persons by Electronic Information Exchange (EIE) on this 26th day of June, 2012.

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